

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

LOUIS GILTMAN, Individually and On Behalf of  
All Others Similarly Situated,

Plaintiff,

VS.

OPENWAVE SYSTEMS, INC., DAVID C. PETERSCHMIDT, HAROLD L. COVERT, DONALD LISTWIN, and ALAN BLACK,

Defendants.

**CIVIL ACTION NO. 1:07-1916**

# CLASS ACTION COMPLAINT

**JURY TRIAL DEMANDED**

Plaintiff, Louis Giltman (“Plaintiff”), alleges the following based upon the investigation by Plaintiff’s counsel, which included, among other things, a review of the Defendants’ public documents, conference calls and announcements made by Defendants, United States Securities and Exchange Commission (“SEC”) filings, wire and press releases published by and regarding Openwave Systems, Inc. (“Openwave” or the “Company”), securities analysts’ reports and advisories about the Company, and information readily available on the Internet, and Plaintiff believes that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

## NATURE OF THE ACTION AND OVERVIEW

1. This is a federal class action on behalf of purchasers of the common stock of Openwave between September 30, 2002 and October 26, 2006, inclusive (the “Class Period”), seeking to pursue remedies under the Securities Exchange Act of 1934 (the “Exchange Act”).

2. Openwave Systems, Inc. provides software products and services for the communications and media industries worldwide. Openwave is the leading independent provider of open software products and services for the communications industry.

3. The Complaint alleges that, throughout the Class Period, Defendants failed to disclose material adverse facts about the Company's financial well-being, business relationships, and prospects. Specifically, Defendants failed to disclose or indicate the following: (1) that the Company purposely concealed the true dates of stock option grants; (2) that the Company incorrectly accounted for its historical stock option grants; (3) that the Company failed to accurately report compensation and payroll tax expenses related to its historical stock option grants; (4) that senior executives of Openwave caused the Company to grant stock options to executives and other employees that improperly had exercise prices below the market price of Openwave stock on the actual date of the option grant; (5) that the Company's financial statements were not prepared in accordance with Generally Accepted Accounting Principles ("GAAP"); (6) that the Company lacked adequate internal and financial controls; and (7) that, as a result of the foregoing, the Company's financial statements were materially false and misleading at all relevant times.

4. Between May 16, 2006 and the end of the Class Period, Openwave's stock option backdating scheme began to unravel. The first disclosure came on May 16, 2006, when the Center for Financial Research and Analysis ("CFRA") published a report that identified Openwave as a company "at risk" for having engaged in the backdating of stock options granted to its officers and directors. Upon the release of this news, shares of the Company's stock declined \$1.48 per share, or 9 percent, to close on May 17, 2006 at \$14.30 per share, on unusually heavy trading volume.

5. The next development occurred on May 22, 2006, when Openwave revealed that it had received a letter from the SEC requesting documents related to the Company's stock option grants and stock option practices. Upon the release of this news, shares of the Company's stock declined an additional \$0.69 per share, or 4.5 percent, to close on May 22, 2006 at \$14.68 per share, on unusually heavy trading volume.

6. Shortly thereafter, on July 5, 2006, Openwave filed a Form 8-K with the SEC to indicate that it had received subpoenas from the United States Attorneys Office requesting documents regarding the Company's stock option grants and stock option practices. Upon the release of this news, shares of the Company's stock declined an additional \$3.70 per share, or 32 percent, to close on July 6, 2006, at \$7.77 per share, on unusually heavy trading volume.

7. Then, on October 4, 2006, Openwave revealed that a special committee of the Company's Board of Directors had determined that the measurement dates for financial accounting purposes for certain stock option grants differed from the actual recorded grant dates for certain awards. As such, the Company indicated that it would likely be forced to restate its financial statements for the prior five years. Additionally, the Company warned investors not to rely upon any of the financial statements previously issued by the Company during the last five years. Following this disclosure, on October 26, 2006 Openwave further revealed that the Company was also reviewing the tax implications triggered as a result of the mandatory accounting adjustments. Upon the release of this news, shares of the Company's stock declined an additional \$1.05 per share, or 11 percent, to close on October 27, 2006 at \$9.56 per share, on unusually heavy trading volume.

8. Lastly, on December 1, 2006, Openwave disclosed that as a consequence of the improper stock option backdating scheme, the Company would be forced to take a \$182 million

charge to the financial results for Fiscal Year 2006 (ended June 2006), which was a direct result of the improper prior accounting for stock based compensation and payroll tax expense. The Company further warned investors not to rely on any of the financial information that the Company previously disclosed, as the Company had now explicitly confirmed that the financial statements were inaccurate as previously provided.

### **JURISDICTION AND VENUE**

9. The claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act, (15 U.S.C. §§ 78j(b) and 78t(a)), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

10. This Court has jurisdiction over the subject matter of this action pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331.

11. Venue is proper in this Judicial District pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa and 28 U.S.C. § 1391(b). Many of the acts and transactions alleged herein, including the preparation and dissemination of materially false and misleading information, occurred in substantial part in this Judicial District.

12. In connection with the acts, conduct and other wrongs alleged in this complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including but not limited to, the United States mails, interstate telephone communications and the facilities of the national securities exchange.

### **PARTIES**

13. Plaintiff, Louis Giltman, as set forth in the accompanying certification, incorporated by reference herein, purchased Openwave common stock at artificially inflated prices during the Class Period and has been damaged thereby.

14. Defendant Openwave is a Delaware corporation with its principal place of business located at 2100 Seaport Boulevard, Redwood City, California.

15. Defendant David C. Peterschmidt (“Peterschmidt”) was the Company’s President, Chief Executive Officer (“CEO”), and a member of the Company’s Board of Directors since 2004.

16. Defendant Harold L. Covert (“Covert”) was the Company’s Chief Financial Officer (“CFO”) since October 1, 2005. From April 2003 to September 2005, Defendant Covert was on the Company’s Board of Directors, and a member of the Board’s Nominating and Corporate Governance Committee and Chairman of the Board’s Audit Committee.

17. Defendant Donald Listwin (“Listwin”) was the Company’s President and Chief Executive Officer (“CEO”) from September 2000 until his resignation in November 2004.

18. Defendant Alan Black (“Black”) was the Company’s Senior Vice President of Corporate Affairs and Chief Financial Officer (“CFO”) from September 2000 until his resignation in November 2004.

19. Defendants Peterschmidt, Covert, Listwin, and Black are collectively referred to hereinafter as the “Individual Defendants.” The Individual Defendants, because of their positions with the Company, possessed the power and authority to control the contents of Openwave’s reports to the SEC, press releases and presentations to securities analysts, money and portfolio managers and institutional investors, i.e., the market. Each Defendant was provided with copies of the Company’s reports and press releases alleged herein to be misleading prior to or shortly after their issuance and had the ability and opportunity to prevent their issuance or cause them to be corrected. Because of their positions and access to material non-public information available to them, each of these Defendants knew that the adverse facts

specified herein had not been disclosed to and were being concealed from the public, and that the positive representations which were being made were then materially false and misleading. The Individual Defendants are liable for the false statements pleaded herein, as those statements were each “group-published” information, the result of the collective actions of the Individual Defendants.

## **SUBSTANTIVE ALLEGATIONS**

### **Background**

20. Openwave Systems, Inc. provides software products and services for the communications and media industries worldwide. Openwave is the leading independent provider of open software products and services for the communications industry.

21. Prior to the Class Period, Openwave continuously represented to investors the accounting method that it used in accounting for stock options given to executive employees. For example, Openwave’s 1999 Proxy Statement (which was filed with the SEC under the name of the Company’s predecessor corporation, Phone.com), in relevant part, stated:

#### **Long-Term Incentive Compensation**

**[The Company] has utilized its stock option plans to provide executives and other key employees with incentives to maximize long-term stockholder value.** Awards under this plan by the Board take the form of stock options designed to give the recipient a significant equity stake in [the Company] and thereby closely align his or her interests with those of [the Company’s] stockholders.

\* \* \*

**Each option grant allows the executive officer to acquire shares of Common Stock at a fixed price per share (the fair market value on the date of grant)** over a specified period of time (up to 10 years). Options granted to the executive officers prior to calendar 1999, typically vested in periodic installments over a four-year period. The options granted to the executive officers in June

1999 vest over a seven year period and the Company expects that future options granted to executive officers will also vest over a seven year period. Accordingly, the option will provide a return to the executive officer only if he or she remains in [the Company's] service, and then only if the market price of the Common Stock appreciates over the option term. [Emphasis added.]

22. Prior to and during the Class Period, Openwave continued to represent that it accounted for its stock options in the same manner. However, as the truth emerged in 2006, it became painfully evident to Openwave's shareholders that the Company did not account for its stock options as it represented that it did.

**Materially False and Misleading  
Statements Issued During the Class Period**

23. The Class Period begins on September 30, 2002. On this day, Openwave filed its Fiscal Year 2002 Annual Report with the SEC on Form 10-K. The Company's Form 10-K was signed by Defendants Listwin and Black and reaffirmed the Company's financial results previously announced on July 23, 2002. Additionally, the Company, in relevant part, stated:

**All stock-based compensation is being amortized in a manner consistent with Financial Accounting Standards Board Interpretation No. 28 (FIN No. 28), *Accounting for Stock Appreciation Rights and Other Variable Stock Option or Award Plans*.** Stock-based compensation consisted of continued amortization of the deferred stock-based compensation related to acquisitions, as well as compensation expense recognized on warrants, options issued to nonemployees **and restricted stock granted to executives at exercise prices below the current fair value of the Company's stock.** We expect our overall stock-based compensation to moderately increase in the coming year.

\* \* \*

(in thousands)	Years ended June 30,	
	2002	2001
Deferred stock-based compensation	\$ (7,159)	\$ (6,079)
***		
Accumulated deficit	(2,319,431)	(1,058,673)
***		
Operating expense – stock Based compensation	14,866	10,223
***		
Operating loss	(1,248,739)	(701,766)
***		
Net loss	(12,260,758)	(689,994)

\*\*\*

Quarterly Results (in thousands)	Year ended June 30, 2002			
	Fourth Quarter	Third Quarter	Second Quarter	First Quarter
***				
Operating expense – stock based compensation	\$2,559	\$2,898	\$4,423	\$4,986
***				
Operating loss	(469,361)	(113,727)	(495,707)	(168,944)
***				
Net loss	(474,752)	(115,676)	(499,879)	(170,451)

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### **Accounting for Stock-Based Compensation**

As permitted under SFAS No. 123, *Accounting for Stock-Based Compensation*, the Company has elected to follow Accounting Principles Board Opinion No.25 (APB No 25), *Accounting for Stock Issued to Employees*, and related interpretations in accounting for stock-based awards to employees. Accordingly, compensation cost for stock options is measured as the excess, if any, of the market price of the Company's common stock at the date of grant over the stock option exercise price.

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### **Stock Plans**

\* \* \*

**Under the 1995 and 1996 Stock Plans, the exercise price for incentive stock options is at least 100% of the fair market value of the Company's stock on the date of grant for employees owning less than 10% of the voting power of all classes of stock, and at least 110% of the fair market value on the date of grant for employees owning more than 10% of the voting power of all classes of stock.** For nonstatutory options granted under the 1995 and 1996 Stock Plans, the exercise price is determined by the Board of Directors except that in the case of a nonstatutory option intended to qualify as "performance-based compensation" within the meaning of Section 162(m) of the Code, **the exercise price shall be no less than 100% of the fair market value of the stock on the date of grant.**

\* \* \*

In March 1999, the Company adopted the Openwave Systems Inc. **1999 Directors' Stock Option Plan (the "Directors' Stock Plan")** which provides for the grant of nonstatutory stock options to nonemployee directors ("Outside Directors"). ... **The exercise price of options granted under the Directors' Stock Plan is equal to the fair market value of the Company's common stock on the date of grant.** Under the Directors' Stock Plan, options have a term of ten years. As of June 30, 2002 there were 994,250 shares available for grant under the Directors' Stock Plan.

**In June 2001, the Company adopted the Openwave Systems Inc. 2001 Stock Compensation Plan (the "2001 Stock Plan").** The 2001 Stock Plan provides for the issuance of nonstatutory stock options, restricted stock bonus awards and restricted stock purchase awards to directors, employees and consultants of the Company. **The 2001 Stock Plan serves as the successor to certain plans of the Company and plans acquired by the Company ... (the "Predecessor Plans"). No further grants will be made under the Predecessor Plans, however, each outstanding option granted under a Predecessor Plan shall continue to be governed by the terms and conditions of the Predecessor Plan under which it was granted.**

A total of 10,604,385 shares of common stock have been reserved for issuance under the 2001 Stock Plan. **Under the 2001 Stock**

**Plan, the exercise price for nonstatutory options is determined by the Plan Administrator and may be above or below the fair market value of the Company's common stock on the date of grant.** Options issued under the 2001 Stock Plan generally expire ten years from the date of grant. Vesting periods are determined by the Plan Administrator and generally provide for shares to vest over a period of four years at 25% per year.

\* \* \*

#### **Stock-Based Compensation**

**The Company uses the intrinsic value method in accounting for its employee stock-based compensation plans.**

\* \* \*

**The fair value of each option was estimated on the date of grant** using the minimum value method prior to the IPO and the Black-Scholes option pricing model after the IPO.

\* \* \*

**The fair value of employee stock purchase rights granted under the Openwave Purchase Plan and the Software.com Purchase Plan was estimated on the date of grants using the Black-Scholes option-pricing model** with no expected dividends and the following weighted-average assumptions. [Emphasis added.]

24. The Company's September 30, 2002 Form 10-K also contained the following Sarbanes-Oxley certification signed by Defendants Listwin and Black:

In connection with the Annual Report of Openwave Systems Inc. on Form 10-K for the fiscal year ended June 30, 2002 as filed with the Securities and Exchange Commission on the date hereof (the "Report"), [Donald Listwin, as Chief Executive Officer / Alan Black, as Chief Financial Officer] of Openwave Systems Inc., certifies, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **to my knowledge that the Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in the**

**Report fairly presents in all material respects the financial condition and results of operations of Openwave Systems Inc.**  
[Emphasis added.]

25. On October 22, 2002, Openwave issued a press release entitled “Openwave Reports Results for First Quarter Fiscal 2003.” Therein, the Company stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading independent provider of open software products and services for the mobile communications industry, today announced that revenues for the first fiscal quarter ended September 30, 2002 were \$71.2 million as compared to \$70.1 million in the fourth fiscal quarter ended June 30, 2002.

**Pro forma net loss for the first fiscal quarter of 2003 was \$29.9 million, or \$0.17 per basic share, compared to a pro forma net loss of \$33.2 million, or \$0.19 per basic share, for the June 2002 quarter. Based on Generally Accepted Accounting Principles (GAAP), net loss for the first fiscal quarter was \$138.5 million, or \$0.79 per basic share, compared to a net loss of \$474.8 million, or \$2.73 per basic share, for the June 2002 quarter. The per share numbers are based on 176.2 and 174.2 million weighted-average basic and diluted shares outstanding for the September and June 2002 quarters, respectively. [Internal footnotes omitted.] [Emphasis added.]**

26. On November 14, 2002, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company’s Form 10-Q was signed by Defendant Black and reaffirmed the Company’s financial results previously announced on October 22, 2002. The Company’s Form 10-Q also contained a Sarbanes-Oxley certification substantially similar to the certification contained in ¶ 24, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	<b>September 30, 2002</b>	<b>June 30, 2002</b>
Deferred stock-based compensation	\$ (4,187)	\$ (7,159)
* * *		
Accumulated deficit	(2,457,975)	(2,319,431)
* * *		

	Three months ended September 30,	
	2002	2001
* * *		
Operating expense – stock based compensation	772	4,986
* * *		
Operating loss	(124,037)	(169,994)
* * *		
Net loss	(138,554)	(170,451)

27. On January 21, 2003, Openwave issued a press release entitled “Openwave Reports Second Quarter Fiscal 2003 Results.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading independent provider of open software products and services for the mobile communications industry, today announced that revenues for the second fiscal quarter ended December 31, 2002 were \$66.8 million as compared to \$71.2 million in the first fiscal quarter ended September 30, 2002 and to \$93.8 in the second fiscal quarter ended December 31, 2001.

**Pro forma net loss for the second fiscal quarter of 2003 was \$24.7 million, or \$0.14 per basic share, compared to a pro forma net loss of \$29.9 million, or \$0.17 per basic share, for the first fiscal quarter of 2003 and compared to a pro forma net loss of \$12.9 million, or \$0.07 per basic share, for the second fiscal quarter of 2002. Based on Generally Accepted Accounting Principles (GAAP), net loss for the second fiscal quarter of 2003 was \$29.5 million, or \$0.17 per basic share, compared to a net loss of \$138.5 million, or \$0.79 per basic share, for the first quarter and compared to a net loss of \$499.9 million, or \$2.88 per basic share, for the second quarter of the prior year. The per share numbers are based on 177.7, 176.2 and 173.5 million weighted-average basic and diluted shares outstanding for the three comparative periods, respectively, for the pro forma and GAAP-based numbers. A table reconciling the Company's results reported on a GAAP basis to its pro forma results for each of these periods is contained on page six of this press release. [Emphasis added.]**

28. On February 14, 2003, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company's Form 10-Q was signed by Defendants Listwin and Black, and

reaffirmed the Company's financial results previously announced on January 21, 2003. The Company's Form 10-Q also contained a Sarbanes-Oxley certification substantially similar to the certification contained in ¶ 24, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	<b>December 31, 2002</b>	<b>June 30, 2002</b>
Deferred stock-based compensation	\$ (4,218)	\$ (7,159)
* * *		
Accumulated deficit	(2,487,472)	(2,319,431)
* * *		
	<b>Three Months Ended December 31,</b>	
	<b>2002</b>	<b>2001</b>
* * *		
Operating expense – stock based compensation	1,322	4,423
* * *		
Operating loss	(26,647)	(495,707)
* * *		
Net loss	(29,497)	(499,879)

29. On April 24, 2003, Openwave issued a press release entitled “Openwave Reports Third Quarter Fiscal 2003 Results.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading independent provider of open software products and services for the mobile communications industry, today announced that revenues for the third fiscal quarter ended March 31, 2003 were \$63.5 million as compared to \$66.8 million in the second fiscal quarter ended December 31, 2002 and \$83.2 million in the third fiscal quarter ended March 31, 2002.

**Based on Generally Accepted Accounting Principles (GAAP), net loss for the third fiscal quarter of 2003 was \$23.2 million, or \$0.13 per basic share, compared to a net loss of \$29.5 million, or \$0.17 per basic share, for the second fiscal quarter and a net loss of \$115.7 million, or \$0.67 per basic share, for the third fiscal quarter in the prior year. The Company's pro forma net loss per basic share for the third fiscal quarter of 2003 was \$0.11 and falls within the range of the pro forma net**

loss outlook of \$0.08 to \$0.16 provided by the Company last quarter. The pro forma net loss per basic share excludes total charges of \$3.3 million for amortization of goodwill and other intangible assets, deferred stock-based compensation and loss on investments in nonmarketable equity securities. The Company does not intend to provide these types of pro forma earnings (loss) results in the future. The per share amounts are based on 178.6, 177.7 and 173.3 million weighted-average basic and diluted shares outstanding for the three comparative periods, respectively. [Emphasis added.]

30. On May 14, 2003, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed the Company's financial results previously announced on April 24, 2003. The Company's Form 10-Q also contained a Sarbanes-Oxley certification substantially similar to the certification contained in ¶ 24, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	March 31, 2003	June 30, 2002
Deferred stock-based compensation	\$ (2,692)	\$ (7,159)
* * *		
Accumulated deficit	(2,510,686)	(2,319,431)
* * *		
	Three Months Ended March 31,	
	2003	2002
* * *		
Operating expense – stock based compensation	686	2,898
* * *		
Operating loss	(19,402)	(113,727)
* * *		
Net loss	(23,214)	(115,676)

31. On July 24, 2003, Openwave issued a press release entitled “Openwave Reports Fourth Quarter and Fiscal 2003 Year End Results.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for the fourth fiscal quarter ended June 30, 2003 were \$66.5 million, an increase from the third fiscal quarter revenue of \$63.5 million. Revenues for the twelve months ended June 30, 2003 were \$268 million.

\* \* \*

**Based on Generally Accepted Accounting Principles (GAAP), net loss for the fourth fiscal quarter of 2003 was \$25.7 million, or \$0.14 per basic share, compared to a net loss of \$23.2 million, or \$0.13 per basic share, for the third fiscal quarter. The per share amounts are based on 179.2 and 178.6 million weighted-average basic and diluted shares outstanding for the two comparative periods, respectively. EBITDA loss, which consists of earnings before interest, taxes, depreciation and amortization of assets including deferred stock-based compensation expense, was \$13.4 million. EBITDA loss without restructuring-related charges was \$5.5 million. The Company considers EBITDA to be an important measure of performance because it reflects the resources available to fund the Company's operations, and it is an important metric often used by investors to evaluate the performance of a business. [Emphasis added.]**

32. On August 28, 2003, Openwave filed its Fiscal Year 2003 Annual Report with the SEC on Form 10-K. The Company's Form 10-K was signed by Defendants Listwin and Covert and reaffirmed Company's financial results previously announced on July 24, 2003. The Company's Form 10-K also contained a Sarbanes-Oxley required certification substantially similar to the certification contained in ¶ 24, *supra*. This Annual Report also contained the same detailed language as to how the Company accounted for stock-based compensation as that set

forth at ¶ 21, *supra*. Additionally, the Company, in relevant part, detailed:

**All stock-based compensation is being amortized in a manner consistent with Financial Accounting Standards Board Interpretation No. 28 (FIN No. 28), *Accounting for Stock Appreciation Rights and Other Variable Stock Option or Award Plans*.** Stock-based compensation consisted of continued amortization of the deferred stock-based compensation related to acquisitions, as well as compensation expense recognized on warrants, options issued to nonemployees and restricted stock granted to executives at exercise prices below the current fair value of our stock.

\* \* \*

#### **Accounting for Stock-Based Compensation**

As permitted under SFAS No. 123, *Accounting for Stock-Based Compensation*, the Company has elected to follow Accounting Principles Board Opinion No.25 (APB No 25), *Accounting for Stock Issued to Employees*, and related interpretations in accounting for stock-based awards to employees. Accordingly, compensation cost for stock options is measured as the excess, if any, of the market price of the Company's common stock at the date of grant over the stock option exercise price. Warrants issued to nonemployees are accounted for using the fair value method of accounting as prescribed by SFAS No. 123 and Emerging Issues Task Force ("EITF") No. 96-18, *Accounting for Equity Instruments That Are Issued to Other Than Employees for Acquiring, or in Conjunction with Selling, Goods or Services*. Compensation costs are amortized in a manner consistent with Financial Accounting Standards Board Interpretation No. 28 (FIN No. 28), *Accounting for Stock Appreciation Rights and Other Variable Stock Option or Award Plans*. The Company uses the Black-Scholes option pricing model to value options and warrants granted to nonemployees.

\* \* \*



	<b>Years ended June 30,</b>	
(in thousands)	<b>2003</b>	<b>2002</b>
Deferred stock-based compensation	\$ (2,185)	\$ (7,159)
***		
Accumulated deficit	(2,536,389)	(2,319,431)
***		
Operating expense – stock based compensation	3,681	14,866
***		
Operating loss	(193,039)	(1,248,739)
***		
Net loss attributable to common stockholders	(216,958)	(1,260,758)

\*\*\*

<b>Quarterly Results</b> (in thousands)	<b>Years ended June 30, 2003</b>			
	<b>Fourth Quarter</b>	<b>Third Quarter</b>	<b>Second Quarter</b>	<b>First Quarter</b>
***				
Operating expense – stock based compensation	\$901	\$686	\$1,322	\$772
***				
Operating loss	(22,953)	(19,402)	(26,647)	(124,037)
***				
Net loss	(25,703)	(26,214)	(29,497)	(138,544)

33. On October 28, 2003, Openwave issued a press release entitled “Openwave Reports First Quarter Fiscal 2004 Results.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWVD), the leading provider of open software products and services for the communications industry, today announced that revenues for its first fiscal quarter ended September 30, 2003 were \$68.0 million, an increase from \$66.5 million for the preceding quarter ended June 30, 2003. In addition to revenue, the Company delivered results at the high end of the range for management's outlook with respect to gross margins, total ending cash and investments, earnings per share, and EBITDA.

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Openwave effected a 1 for 3 reverse stock split on October 21. Per share net loss on a pre- and post-split basis are as follows:

***Pre-Split***

Based on Generally Accepted Accounting Principles (GAAP), net loss for the first quarter ended September 30, 2003 was \$14.0 million or \$0.08 per basic share pre-split, compared to a net loss of \$25.7 million or \$0.14 per basic pre-split share for the preceding quarter.

***Post-Split***

**Based on GAAP, net loss for the first quarter ended September 30, 2003 was \$14.0 million or \$0.23 per basic post-split share, compared to a net loss of \$25.7 million or \$0.43 per basic post-split share for the preceding quarter. [Emphasis added.]**

34. On November 14, 2003, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed the Company's financial results previously announced on October 28, 2003. The Company's Form 10-Q also contained a Sarbanes-Oxley required certification substantially similar to the certification contained in ¶ 24, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	September 30, 2003	June 30, 2003
Deferred stock-based compensation	\$ (1,554)	\$ (2,185)
* * *		
Accumulated deficit	(2,550,378)	(2,536,389)
* * *		
	Three Months Ended September 30,	
	2003	2002
* * *		
Operating expense – stock based compensation	735	772
* * *		
Operating loss	(12,995)	(124,037)
* * *		
Net loss	(13,989)	(138,544)

35. On January 21, 2004, Openwave issued a press release entitled “Openwave Reports Second Quarter Fiscal 2004 Results.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its second fiscal quarter ended December 31, 2003 were \$71.8 million, an increase of \$3.8 million from \$68.0 million during the preceding quarter ended September 30, 2003 and an increase of \$5.0 million from \$66.8 million during the December quarter in the preceding year.

\* \* \*

**Net loss for the second quarter ended December 31, 2003 was \$9.4 million or \$0.15 per basic and diluted share, compared to a net loss of \$14.0 million or \$0.23 per basic and diluted share for the preceding quarter and a net loss of \$29.5 million or \$0.50 per basic and diluted share for the December quarter in the preceding year. [Emphasis added.]**

36. On February 17, 2004, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company’s Form 10-Q reaffirmed the Company’s financial results previously announced on January 21, 2004. The Company’s Form 10-Q also contained a Sarbanes-Oxley required certification substantially similar to the certification contained in ¶ 24, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	<b>December 31, 2003</b>	<b>June 30, 2003</b>
Deferred stock-based compensation	\$ (2,087)	\$ (2,185)
* * *		
Accumulated deficit	(2,559,765)	(2,536,389)
* * *		

	<b>Three Months Ended December 31,</b>	
	<b>2003</b>	<b>2002</b>
* * *		
Operating expense – stock based compensation	754	1,332
* * *		
Operating loss	(4,605)	(26,647)
* * *		
Net loss	(9,387)	(29,497)

37. On April 28, 2004, Openwave issued a press release entitled “Openwave Reports Third Quarter Fiscal 2004 Results.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its third fiscal quarter ended March 31, 2004 were \$74.2 million, an increase from \$71.8 million during the preceding quarter ended December 31, 2003 and an increase of 16.9% from \$63.5 million during the March quarter in the preceding year.

\* \* \*

**Net loss for the third fiscal quarter ended March 31, 2004 was \$5.7 million, or \$0.09 per basic and diluted share, compared to a net loss of \$9.4 million, or \$0.15 per basic and diluted share, for the preceding quarter and a net loss of \$23.2 million, or \$0.39 per basic and diluted share, for the March quarter in the preceding year. [Emphasis added.]**

38. On May 12, 2004, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company’s Form 10-Q reaffirmed the Company’s financial results previously announced on April 28, 2004. The Company’s Form 10-Q also contained a Sarbanes-Oxley required certification substantially similar to the certification contained in ¶ 24, *supra*. Additionally, the

39. Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	March 31, 2004	June 30, 2003
Deferred stock-based compensation	\$ (2,716)	\$ (2,185)
* * *		
Accumulated deficit	(2,565,503)	(2,536,389)
* * *		
	Three Months Ended March 31,	
	2004	2003
* * *		
Operating expense – stock based compensation	938	686
* * *		
Operating loss	(4,547)	(19,402)
* * *		
Net loss	(5,738)	(23,214)

40. On July 28, 2004, Openwave issued a press release entitled “Openwave Reports Fourth Quarter Fiscal 2004 Results.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its fiscal fourth quarter ended June 30, 2004 were \$76.8 million, an increase of \$2.6 million or 3% from \$74.2 million during the preceding quarter ended March 31, 2004, and an increase of \$10.3 million or 15% from \$66.5 million during the June quarter in the preceding year. Revenues for the twelve months ended June 30, 2004 were \$291 million.

"Positive operating income was achieved for the first time," said Don Listwin, president and CEO of Openwave. "This is a major milestone for the company."

**Net loss for the fiscal fourth quarter ended June 30, 2004 was \$737,000, or \$0.01 per basic and diluted share, compared to a net loss of \$5.7 million, or \$0.09 per basic and diluted share, for the preceding quarter and a net loss of \$25.7 million, or \$0.43 per basic and diluted share, for the fiscal fourth quarter ended June 30, 2003. Net loss for the 2004 fiscal year ended**

**June 30, 2004 was \$29.9 million, an 86% improvement from the \$217 million net loss reported for the previous fiscal year.**  
[Emphasis added.]

41. On September 13, 2004, Openwave filed its Fiscal Year 2004 Annual Report with the SEC on Form 10-K. The Company's Form 10-K was signed by Defendants Listwin and Covert, and reaffirmed the Company's financial results previously announced on July 28, 2004. This Annual Report also contained the same detailed language regarding how the Company accounted for stock-based compensation as that set forth at ¶ 21, *supra*. Additionally, the Company, in relevant part, detailed:

**All stock-based compensation is being amortized in a manner consistent with Financial Accounting Standards Board Interpretation ("FIN") No. 28, "*Accounting for Stock Appreciation Rights and Other Variable Stock Option or Award Plans.*"** Stock-based compensation consists of continued amortization of the deferred stock-based compensation related to acquisitions, as well as compensation expense recognized on warrants, options issued to non-employees and restricted stock granted to executives and other employees at exercise prices below the current fair value of our stock.

\* \* \*

#### **Accounting for Stock-Based Compensation**

**As permitted under SFAS No. 123, *Accounting for Stock-Based Compensation*, the Company has elected to follow Accounting Principles Board Opinion No.25 (APB No 25), *Accounting for Stock Issued to Employees*, and related interpretations in accounting for stock-based awards to employees. Accordingly, compensation cost for stock options is measured as the excess, if any, of the market price of the Company's common stock at the date of grant over the stock option exercise price.** Warrants issued to nonemployees are accounted for using the fair value method of accounting as prescribed by SFAS No. 123 and Emerging Issues Task Force ("EITF") No. 96-18, *Accounting for Equity Instruments That Are Issued to Other Than Employees for Acquiring, or in Conjunction with Selling, Goods or Services*. Compensation costs are amortized in a manner consistent with Financial Accounting Standards Board Interpretation No. 28 (FIN

No. 28), *Accounting for Stock Appreciation Rights and Other Variable Stock Option or Award Plans*. The Company uses the Black-Scholes option pricing model to value options and warrants granted to nonemployees.

\* \* \*

(in thousands)	Years ended June 30,	
	2004	2003
Deferred stock-based compensation	(1,191)	\$ (2,185)
* * *		
Accumulated deficit	(2,566,240)	(2,536,389)
* * *		
	Fiscal year ended June 30,	
	2004	2003
Operating expense – stock based compensation	3,150	3,681
* * *		
Operating loss	(20,500)	(193,039)
* * *		
Net loss	(29,851)	(216,958)

42. The Company's Form 10-K filed with the SEC on September 13, 2004 also contained the following Sarbanes Oxley required certifications, which stated:

**I, [Don Listwin, President and Chief Executive Officer] of Openwave Systems Inc. certify that:**

1. I have reviewed this annual report on Form 10-K of Openwave Systems Inc.;
2. **Based on my knowledge, this annual report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;**
3. Based on my knowledge, the financial statements, and other financial information included in this annual report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

**4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) for the registrant, and we have:**

- a) designed such disclosure controls and procedures or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
- b) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;**
- c) evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
- d) disclosed in this annual report any change in the registrant's internal control over financial reporting that occurred during the registrant's fourth fiscal quarter that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting.

**5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent functions):**

- a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record,**



**process, summarize and report financial information;  
and**

- b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls over financial reporting.**

\* \* \*

In connection with the Annual Report on Form 10-K of Openwave Systems Inc. (the "Company") for the year ended June 30, 2004 as filed with the Securities and Exchange Commission on the date hereof (the "Report"), [Don Listwin, as Chief Executive Officer of the Company, and Joshua Pace, as Chief Financial Officer of the Company], each **hereby certifies, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to the best of his knowledge:**

- 1) the Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, and**
- 2) the information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of Openwave Systems Inc.**

43. On October 26, 2004, Openwave issued a press release entitled "Openwave Achieves Profitability – Reports First Quarter 2005 Fiscal Results." Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading independent provider of open software products and services for the communications industry, today announced that revenues for its first fiscal quarter ended September 30, 2004 were \$83.6 million, an increase of 9% from \$76.8 million during the preceding quarter ended June 30, 2004 and an increase of 23% from \$68.0 million during the September quarter in the preceding year.

\* \* \*

**Net income on a GAAP basis for the first fiscal quarter ended September 30, 2004 was \$957,000, or \$0.01 per basic and diluted share, compared to a net loss of \$737,000, or (\$0.01) per basic and diluted share, for the preceding quarter and a net**

loss of \$14.0 million, or (\$0.23) per basic and diluted share, for the September quarter in the preceding year. Net income on a non-GAAP basis, excluding all amortization of acquisition related intangibles and restructuring costs, for the first fiscal quarter ended September 30, 2004 was \$3.5 million, or \$0.05 per basic and diluted share. A reconciliation between net income on a GAAP basis and a non-GAAP basis is provided below in a table immediately following the Condensed Consolidated Statements of Operations. [Emphasis added.]

44. On November 9, 2004, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed the Company's financial results previously announced on October 26, 2004. The Company's Form 10-Q also contained Sarbanes-Oxley required certifications substantially similar to the certifications contained in ¶ 41, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	September 30, 2004	June 30, 2004
Deferred stock-based compensation	\$ (1,762)	\$ (1,991)
* * *		
Accumulated deficit	(2,565,283)	(2,566,240)
* * *		
	Three Months Ended September 30,	
	2004	2003
* * *		
Operating expense – stock based compensation	594	735
* * *		
Operating income (loss)	3,213	(12,995)
* * *		
Net income	957	(13,989)

45. On January 27, 2005, Openwave issued a press release entitled “Openwave Achieves 30% Revenue Growth in Second Quarter.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its second fiscal quarter ended December 31, 2004 were \$93.5 million, an increase of \$9.9 million, or 12%, from \$83.6 million during the preceding quarter ended September 30, 2004 and an increase of \$21.8 million, or 30%, from \$71.8 million during the December quarter in the preceding year.

\* \* \*

**Net income on a GAAP basis for the second fiscal quarter ended December 31, 2004 was \$1.9 million or \$0.03 per diluted share, compared to net income of \$957,000 or \$0.01 per diluted share for the preceding quarter and a net loss of \$9.4 million or \$0.15 per diluted share for the December quarter in the preceding year. Net income on a non-GAAP basis, excluding all amortization of acquisition related intangibles and restructuring costs, for the second fiscal quarter ended December 31, 2004 was \$4.6 million, or \$0.07 per diluted share, compared with \$3.5 million, or \$0.05 per diluted share in the prior quarter. A reconciliation between net income on a GAAP basis and a non-GAAP basis is provided below in a table immediately following the Condensed Consolidated Statements of Operations. [Emphasis added.]**

46. On February 9, 2005, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company’s Form 10-Q reaffirmed the Company’s financial results previously announced on January 27, 2005. The Company’s Form 10-Q also contained Sarbanes-Oxley required certifications substantially similar to the certifications contained in ¶ 41, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based

compensation:

(in thousands)	<b>December 31, 2004</b>	<b>June 30, 2004</b>
Deferred stock-based compensation	\$ (7,236)	\$ (1,991)
* * *		
Accumulated deficit	(2,563,417)	(2,566,240)
* * *		
	<b>Three Months Ended December 31,</b>	
	<b>2004</b>	<b>2003</b>
* * *		
Operating expense – stock based compensation	1,232	754
* * *		
Operating income (loss)	2,964	(4,605)
* * *		
Net income (loss)	1,866	(9,387)

47. On April 27, 2005, Openwave issued a press release entitled “Openwave Grows Revenue 43% in Third Quarter.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its third fiscal quarter ended March 31, 2005 were \$106.3 million, an increase of \$12.8 million, or 14%, from \$93.5 million during the preceding quarter ended December 31, 2004 and an increase of \$32.1 million, or 43%, from \$74.2 million during the March quarter in the preceding year.

\* \* \*

**On a GAAP basis, net loss for the third fiscal quarter ended March 31, 2005 was \$2.6 million or \$0.04 per share, compared to net income of \$1.9 million or \$0.03 per diluted share for the preceding quarter and a net loss of \$5.7 million or \$0.09 per share for the March quarter in the preceding year. Net income on a non-GAAP basis, which excludes amortization of intangibles and acquisition-related stock-based compensation, and restructuring and related costs, for the third fiscal quarter ended March 31, 2005 was \$4.7 million, or \$0.07 per diluted share, compared with \$4.6 million, or \$0.07 per diluted share**

**in the prior quarter. A reconciliation between net income (loss) on a GAAP basis and a non-GAAP basis is provided below in a table immediately following the Condensed Consolidated Statements of Operations.** [Emphasis added.]

48. On May 9, 2005, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed the Company's financial results previously announced on April 27, 2005. The Company's Form 10-Q also contained Sarbanes-Oxley required certifications substantially similar to the certifications contained in ¶ 41, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	March 31, 2005	June 30, 2004
Deferred stock-based compensation	\$ (7,607)	\$ (1,991)
* * *		
Accumulated deficit	(2,566,031)	(2,566,240)
* * *		
	Three Months Ended March 31,	
	2005	2004
* * *		
Operating expense – stock based compensation	1,011	938
* * *		
Operating income (loss)	1,773	(4,547)
* * *		
Net income (loss)	(2,614)	(5,738)

49. On August 4, 2005, Openwave issued a press release entitled "Openwave Reports Fourth Quarter Financial Results – Largest Bookings Quarter in Company History." Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its fourth fiscal quarter ended June 30, 2005 were \$100.3 million, an increase of \$23.5 million, or 31%, from \$76.8 million during the June quarter in the

preceding year. Openwave posted bookings of \$130.4 million, the highest level in the company's history.

\* \* \*

**Including \$64.6 million in restructuring charges, net loss for the fourth fiscal quarter ended June 30, 2005 on a GAAP basis was \$62.3 million, or \$0.91 per share, compared to a net loss of \$0.7 million, or \$0.01 per share, for the June quarter in the preceding year. Net income on a non-GAAP basis, which excludes amortization of intangibles and acquisition-related stock-based compensation, and restructuring and related costs, for the fourth fiscal quarter ended June 30, 2005 was \$4.8 million, or \$0.07 per diluted share. A reconciliation between net income (loss) on a GAAP basis and a non-GAAP basis is provided below in a table immediately following the Condensed Consolidated Statements of Operations. [Emphasis added.]**

50. On September 12, 2005, Openwave filed its Fiscal Year 2005 Annual Report with the SEC on Form 10-K. The Company's Form 10-K was signed by Defendant Peterschmidt and reaffirmed the Company's financial results previously announced on August 4, 2005. The Company's Form 10-K also contained Sarbanes-Oxley required certifications substantially similar to the certifications contained in ¶ 41, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

**All stock-based compensation is being amortized in a manner consistent with Financial Accounting Standards Board Interpretation No. 28 (FIN No. 28), *Accounting for Stock Appreciation Rights and Other Variable Stock Option or Award Plans*.** Stock-based compensation consisted of continued amortization of the deferred stock-based compensation related to acquisitions, as well as compensation expense recognized on warrants, options issued to nonemployees and restricted stock granted to executives at exercise prices below the current fair value of our stock.

\* \* \*

### Accounting for Stock-Based Compensation

As permitted under SFAS No. 123, *Accounting for Stock-Based Compensation*, the Company has elected to follow Accounting Principles Board Opinion No.25 (APB No 25), *Accounting for Stock Issued to Employees*, and related interpretations in accounting for stock-based awards to employees. Accordingly, compensation cost for stock options is measured as the excess, if any, of the market price of the Company's common stock at the date of grant over the stock option exercise price. Warrants issued to nonemployees are accounted for using the fair value method of accounting as prescribed by SFAS No. 123 and Emerging Issues Task Force ("EITF") No. 96-18, *Accounting for Equity Instruments That Are Issued to Other Than Employees for Acquiring, or in Conjunction with Selling, Goods or Services*. Compensation costs are amortized in a manner consistent with Financial Accounting Standards Board Interpretation No. 28 (FIN No. 28), *Accounting for Stock Appreciation Rights and Other Variable Stock Option or Award Plans*. The Company uses the Black-Scholes option pricing model to value options and warrants granted to nonemployees.

\* \* \*

(in thousands)	Years ended June 30,	
	2005	2004
Deferred stock-based compensation	(13,163)	\$ (1,991)
* * *		
Accumulated deficit	(2,628,369)	(2,566,240)
* * *		
	Fiscal year ended June 30,	
	2005	2004
Operating expense – stock based compensation	5,202	3,150
* * *		
Operating loss	(53,903)	(20,500)
* * *		
Net loss	(62,129)	(29,851)

51. On October 26, 2005, Openwave issued a press release entitled "Openwave Reports 24% Year Over Year Quarterly Revenue Growth – Quarter's Performance Positions Company to Meet or Exceed High End of Calendar 2005 Financial Targets." Therein, the

Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its first fiscal quarter ended September 30, 2005 were \$103.3 million, an increase of \$19.7 million, or 24%, from \$83.6 million during the September quarter in the preceding year, and an increase of \$3.0 million, or 3%, from \$100.3 million for the prior quarter ended June 30, 2005.

\* \* \*

**On a GAAP basis, net loss for the first fiscal quarter ended September 30, 2005 was \$7.7 million, or \$0.11 per share, compared to a net income of \$1.0 million, or \$0.01 per share, for the September quarter in the preceding year and a net loss of \$62.3 million, or \$0.91 per share in the prior quarter.** [Emphasis added.]

52. On November 9, 2005, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company's Form 10-Q was signed by Defendant Covert and reaffirmed the Company's financial results previously announced on October 26, 2005. The Company's Form 10-Q also contained Sarbanes-Oxley required certifications substantially similar to the certifications contained in ¶ 41, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	September 30, 2005	June 30, 2005
Deferred stock-based compensation	\$ ---	\$ (13,163)
* * *		
Accumulated deficit	(2,636,045)	(2,628,369)
* * *		
	Three Months Ended September 30,	
	2005	2004
* * *		
Operating expense – stock based compensation	[10,204]	[594]



	* * *		
Operating income (loss)		(5,710)	3,213
	* * *		
Net income (loss)		(7,676)	957

53. On December 1, 2005, Openwave filed a Shelf Registration Statement with the SEC on Form S-3ASR, as well as a Preliminary Prospectus Supplement which constituted part of the Registration Statement (“Registration Statement”). The Registration Statement was signed by Defendants Peterschmidt and Covert. On December 8, 2005, the Company filed a Prospectus Supplement (“Prospectus”) with the SEC. These filings with the SEC contained the Company’s financial data for Fiscal Years 2002 (ended June 2002), 2003 (ended June 2003), and 2004 (ended June 2004).

54. On January 26, 2006, Openwave issued a press release entitled “Openwave Reports Record Earnings – Revenue at the High-End of Outlook.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its second fiscal quarter ended December 31, 2005 were \$104.5 million, an increase of \$11.0 million, or 12%, from \$93.5 million during the December quarter in the preceding year, and an increase of \$1.2 million, or 1%, from \$103.3 million for the prior quarter ended September 30, 2005.

\* \* \*

**Net income on a GAAP basis for the second fiscal quarter ended December 31, 2005 was \$8.4 million, or \$0.11 per share, compared to net income of \$1.9 million, or \$0.03 per share, for the December quarter in the preceding year and a net loss of \$7.7 million, or \$0.11 per share in the prior quarter. [Emphasis added.]**

55. On February 8, 2006, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company’s Form 10-Q was signed by Defendant Covert and reaffirmed the

Company's financial results previously announced on January 26, 2006. The Company's Form 10-Q also contained Sarbanes-Oxley required certifications substantially similar to the certifications contained in ¶ 41, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	<b>December 31, 2005</b>	<b>June 30, 2005</b>
Deferred stock-based compensation	\$ ---	\$ (13,163)
* * *		
Accumulated deficit	(2,627,601)	(2,628,369)
* * *		
	<b>Three Months Ended December 31,</b>	
	<b>2005</b>	<b>2004</b>
* * *		
Operating expense – stock based compensation	[11,311]	[1,232]
* * *		
Operating income	9,379	2,964
* * *		
Net income	8,444	1,866

56. On April 27, 2006, Openwave issued a press release entitled “Openwave Reports Solid Third Quarter Revenue and Earnings in Line With Projections.” Therein, the Company, in relevant part, stated:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced that revenues for its third fiscal quarter ended March 31, 2006 were \$113.0 million, an increase of \$6.7 million, or 6%, from \$106.3 million during the March quarter in the preceding year, and an increase of \$8.5 million, or 8%, from \$104.5 million for the prior quarter ended December 31, 2005.

**Net income on a GAAP basis for the third fiscal quarter ended March 31, 2006 was \$9.6 million, or \$0.10 per share, compared to a net loss of \$2.6 million, or \$0.04 per share, for the March quarter in the preceding year and net income of \$8.4 million, or \$0.11 per share in the prior quarter. [Emphasis added.]**

57. On May 10, 2006, Openwave filed its Quarterly Report with the SEC on Form 10-Q. The Company's Form 10-Q was signed by Defendant Covert and reaffirmed the Company's financial results previously announced on April 27, 2006. The Company's Form 10-Q also contained Sarbanes-Oxley required certifications substantially similar to the certifications contained in ¶ 41, *supra*. Additionally, the Company, in relevant part, detailed the following regarding stock-based compensation:

(in thousands)	<b>March 31, 2006</b>	<b>June 30, 2005</b>
Deferred stock-based compensation	\$ ---	\$ (13,163)
* * *		
Accumulated deficit	(2,618,031)	(2,628,369)
* * *		
	<b>Three Months Ended March 31,</b>	
	<b>2006</b>	<b>2005</b>
* * *		
Operating expense – stock based compensation	[10,658]	[550]
* * *		
Operating income	6,151	1,773
* * *		
Net income (loss)	9,570	(2,614)

58. The statements contained in ¶¶ 23 – 57 were materially false and misleading when made because Defendants failed to disclose or indicate the following: (1) that the Company purposely concealed the true dates of stock option grants; (2) that the Company incorrectly accounted for its historical stock option grants; (3) that the Company failed to accurately report compensation and payroll tax expenses related to its historical stock option grants; (4) that senior executives of Openwave caused the Company to grant stock options to executives and other employees that improperly had exercise prices below the market price of Openwave stock on the

actual date of the option grant; (5) that the Company's financial statements were not prepared in accordance with Generally Accepted Accounting Principals ("GAAP"); (6) that the Company lacked adequate internal and financial controls; and (7) that, as a result of the foregoing, the Company's financial statements were materially false and misleading at all relevant times.

### **The Truth Begins to Emerge**

59. On May 16, 2006, a report published by the Center for Financial Research and Analysis ("CFRA") identified Openwave as a company "at risk" for having engaged in the backdating of stock options granted to its officers and directors. Upon the release of this news, shares of the Company's stock declined \$1.48 per share, or 9 percent, to close on May 17, 2006 at \$14.30 per share, on unusually heavy trading volume.

60. On May 22, 2006, Openwave issued a press release entitled "Openwave Receives Letter of Inquiry." Therein, the Company, in relevant part, revealed:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today **announced that it has received a letter of informal inquiry from the Securities and Exchange Commission requesting documents related to the Company's stock option grants and stock option practices.** The SEC letter states that the informal inquiry should not be construed as an indication by the SEC or its staff that any violation of law has occurred, or as an adverse reflection upon any person, entity, or security. The Company intends to cooperate fully with the SEC in this matter. [Emphasis added.]

61. Upon the release of this news, shares of the Company's stock declined an additional \$0.69 per share, or 4.5 percent, to close on May 22, 2006 at \$14.68 per share, on unusually heavy trading volume.

62. On July 5, 2006, Openwave filed a Form 8-K with the SEC to indicate that it had received subpoenas from two separate United States Attorney's offices regarding their

investigation into the Company's stock option practices. Upon the release of this news, shares of the Company's stock declined an additional \$3.70 per share, or 32 percent, to close on July 6, 2006, at \$7.77 per share, on unusually heavy trading volume.

63. On October 4, 2007, Openwave issued a press release entitled "Openwave Announces Stock Option Investigation Update – Company Receives NASDAQ Notice." Therein, the Company, in relevant part, revealed:

Openwave Systems Inc. (Nasdaq: OPWV), the leading independent provider of software solutions for the communications and media industries, today announced an update of its stock option investigation and that the Company has received a Staff Determination from NASDAQ.

**The Special Committee of the Company's Board of Directors is in the process of concluding its independent investigation relating to the Company's stock option grants and practices.** The Special Committee to date has not found evidence that leads it to conclude that there was fraud or manipulation in the granting of options. **While the results are not yet finalized, the Special Committee has determined that the measurement dates for financial accounting purposes for certain stock option grants differ from recorded grant dates for certain awards and will likely cause the Company to restate its financial statements. The Company is also reviewing the tax implications of these adjustments, but the Company has not completed its review nor reached any preliminary conclusions regarding the tax implications.**

\* \* \*

**Based on the work of the Special Committee of the Board of Directors, on October 2, 2006, the Company concluded that all financial statements previously issued by the Company should no longer be relied upon.** The Company's management and the Special Committee have discussed this matter with KPMG, the Company's independent registered public accounting firm. [Emphasis added.]

64. On October 26, 2006, Openwave issued a press release entitled "Openwave Reports Preliminary First Quarter Fiscal 2007 Financial Results." Therein, the Company, in

relevant part, revealed:

Openwave Systems Inc. (Nasdaq: OPWV), the leading provider of open software products and services for the communications industry, today announced preliminary financial results for its fiscal 2007 first quarter ended September 30, 2006. **All financial figures presented are estimates which may be subject to adjustment as a result of the likely restatement of historical results discussed below.**

\* \* \*

#### **Results Subject to Adjustment**

As previously announced on October 4, 2006, a Special Committee investigating Openwave's stock option practices is in the process of concluding its independent investigation relating to the Company's stock option grants and practices. The Special Committee to date has not found evidence that leads it to conclude that there was fraud or manipulation in the granting of options. **While the results are not yet finalized, the Special Committee has determined that the measurement dates for financial accounting purposes for certain stock option grants differ from recorded grant dates for certain awards and will likely cause the Company to restate its financial statements. The Company is also reviewing the tax implications of these adjustments, but the Company has not completed its review nor reached any final conclusions regarding the tax implications.** [Emphasis added.]

65. Upon the release of this news, shares of the Company's stock declined an additional \$1.05 per share, or 11 percent, to close on October 27, 2006 at \$9.56 per share, on unusually heavy trading volume.

#### **Post Class Period Disclosures**

66. On December 1, 2006, Openwave issued a press release entitled "Openwave Files 10-K for Fiscal Year 2006 – Annual Meeting Scheduled for January 17, 2007." Therein, the Company, in relevant part, revealed:

**The Special Committee reviewed all grants of stock options from June 1999 to September 2006 and undertook an extensive examination of the Company's accounting policies, accounting**

records, supporting documentation, e-mail communications and interviews with current and former employees and Board members.

The key findings of the Special Committee are as follows:

1. The Special Committee did not find evidence that leads it to conclude that there was fraud or manipulation in the granting of stock options.
2. The Special Committee identified certain circumstances in which the grant date used by the Company as the "measurement date" for accounting purposes preceded the appropriate measurement date.

**In light of these findings by the Special Committee, Openwave re-measured certain stock option grants which resulted in additional non-cash charges for stock-based compensation and associated payroll tax expense for fiscal years 2000 through 2005, totaling approximately \$182 million. The Company noted that \$167 million, or 92%, of the total \$182 million charge was related to fiscal 2001 (\$135 million) and fiscal 2002 (\$32 million).**

**Openwave has not amended, and does not intend to amend, its previously filed annual reports on form 10-K or quarterly reports on form 10-Q for the periods affected by the restatements. The financial information that has been previously filed or otherwise reported for the periods from fiscal 1999 through fiscal 2005 is superseded by the information in the form 10-K for fiscal 2006. As a result, the financial statements and related financial information contained in such previously filed reports should no longer be relied upon.** Additional details, including related disclosures, are available in the Company's form 10-K, filed today. [Emphasis added]

67. On December 1, 2006, Openwave filed its Fiscal Year 2006 Annual Report with the SEC on Form 10-K. The Company's Form 10-K was signed by Defendants Peterschmidt and Covert. Additionally, the Company, in relevant part, detailed:

**In this Form 10-K, we are restating the consolidated balance sheet as of June 30, 2005 and the related consolidated**

**statements of operations, stockholders' equity and comprehensive loss, and cash flows for each of the years in the two-year period ended June 30, 2005, and each of the quarters in the fiscal year 2005.** Our decision to restate was based on the results of an independent review into our stock option accounting that was conducted under the direction of a special committee of the board of directors (the "Special Committee").

As part of the restatement, we have also made changes to the balance sheet as of June 30, 2005 to adjust certain income tax assets and liabilities to correct errors identified in the fourth quarter of fiscal 2006, as well as certain deferred revenues and accrued liabilities to correct errors identified in fiscal year 2005 which were not material to the statement of operations for any prior fiscal year. These changes are described in more detail below. We are also restating the pro forma disclosures for stock-based compensation expense required under Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation*, (FAS 123) included in Note 2 to the consolidated financial statements.

This Form 10-K also reflects the restatement of (i) "Selected Consolidated Financial Data" for the fiscal years ended June 30, 2005, 2004, 2003, and 2002 in Item 6 and (ii) "Management's Discussion and Analysis of Financial Condition and Results of Operations in Item 7 for the years ended June 30, 2005 and 2004.

**Previously filed annual reports on Form 10-K and quarterly reports on Form 10-Q affected by the restatements have not been amended and, as such, should not be relied upon.**

68. With regard to the special committees' findings following the internal investigation of the Company's stock option practices, the Company, in relevant part, revealed:

**The Special Committee reviewed all grants of options or restricted stock made by the Company** from our predecessor company Phone.com's IPO in June 1999 to September 2006. ... **Over 56 million shares granted were reviewed, of which approximately 33% were remeasured based upon the review.** The review included an extensive examination of our accounting policies, accounting records, supporting documentation, and e-mail communications, as well as interviews with numerous current and former employees and current and former members of our board of directors.



\* \* \*

[T]he Special Committee's review identified circumstances where the grant date used by us as the "measurement date" for accounting purposes (the "Record Date") preceded the appropriate measurement date, as defined in the accounting literature.

- **The Special Committee found evidence to conclude that there were deficiencies in the process by which many options were granted through Unanimous Written Consent ("UWC") by the Compensation Committee of the Board of Directors. The Record Date, which was based upon the typed "effective date", of these grants was on or before the date distributed but often preceded the return of the signed consents and formal approval by Compensation Committee members. ... Accordingly, the Special Committee found that the appropriate measurement date likely differed from the Record Date of grants authorized through UWC of the Compensation Committee unless conclusive evidence was available to establish that the Record Date was appropriate.**
- **The Special Committee found evidence to conclude that there were deficiencies in the process by which certain options were granted by the Stock Option Committee ("SOC"), a one-person committee with authority delegated from the Compensation Committee, consisting of the Company's CEO. For certain grants, the SOC or an executive on his behalf, communicated to the Stock Administration group that the SOC had decided to grant stock options more than one day after the Record Date. ... [T]he Special Committee concluded that the appropriate measurement date likely differed from the Record Date for SOC option grants during this timeframe unless conclusive evidence was available to establish that the Record Date was appropriate.**

69. With regard to the impact that such discoveries by the special committee would have on the Company's financial condition, the Company stated:

**As a result of the findings of the Special Committee, we remeasured certain stock option grants which resulted in additional stock-based compensation and associated payroll**

**tax expense for fiscal years 2000 through 2005. This expense is the result of options granted with an intrinsic value totaling \$197.4 million. Intrinsic value is the quoted market price of the stock at the measurement date less the strike price the recipient would need to pay to exercise the option.** The impact of amortizing the intrinsic value over the related service periods, after accounting for forfeitures, and the associated payroll tax expense is as follows:

<b>Fiscal Year</b>	<b>Additional Expense (\$000's)</b>
2000	3,069
2001	135,414
2002	31,652
2003	10,318
2004	603
2005	645
<b>Total for all fiscal years</b>	<b>181,701</b>

The impact to fiscal year 2001 reflects the large number of options remeasured with a substantial positive intrinsic value due to the increase in the stock price during that timeframe. Additionally, many options granted in fiscal year 2001 were cancelled during the same fiscal year with an agreement to reissue options six to seven months later with an exercise price equal to the stock price on the replacement grant date. The cancellation resulted in previously deferred compensation being recognized in an accelerated manner in fiscal 2001 as the cancellation was not as a result of failure of the employee to meet the service obligation.

**The impact of the remeasured grants to previously disclosed pro forma expense under FAS 123 is as follows:**

<b>Fiscal Year</b>	<b>(Reduction) Addition to Pro-Forma Expense (\$000's)</b>
2000	(5,057)
2001	40,317
2002	36,954
2003	115,631
2004	5,814
2005	(304)
<b>Total for all fiscal years</b>	<b>93,355</b>

\* \* \*

- Grants remeasured using the date such grants were entered into the options database accounted for approximately 16% of the \$181.7 million incremental expense.

70. With regard to the restatement of its prior financial results, and the impact that this would have on the Company, the Company stated:

**Because the prices at the originally stated grant dates were lower than the prices on the actual measurement dates, we recognized material amounts of stock-based compensation expense which were not accounted for in our previously issued financial statements. Accordingly, management concluded that our previously issued financial statements should no longer be relied upon.**

**As a result of the Special Committee's review, as well as management's review of our historical financial statements, we have restated our financial results for fiscal years ended June 30, 1999 through 2005, including each of the quarters in fiscal year 2005.**

**As a result of the events described above, we have become subject to the following significant risks, each of which could have a material adverse effect on our business, financial condition and results of operations.**

**We face risks related to the SEC and US Attorney inquiries regarding our historic and current stock option grants and practices, which have required significant management time and attention, caused us to incur significant accounting and legal expense and could require us to pay fines or other penalties.**

\*\*\*

**We have also incurred expenses relating to legal, accounting, tax and other professional services in connection with these matters and expect to continue to incur significant expenses in the future, which may adversely affect our results of operations and cash flows.**

71. To further illustrate the financial impact that the special committees' findings would have on the Company's restated financial results, the Company provided the following

chart illustrating the true financial effect:

	<b>Fiscal Year ended June 30,</b>					
	<b>2005</b>	<b>2004</b>	<b>2003</b>	<b>2002</b>	<b>2001</b>	<b>2000</b>
	<b>Restated</b>	<b>Restated</b>	<b>Restated</b>	<b>Restated</b>	<b>Restated</b>	<b>Restated</b>
Net loss	\$(62,774)	\$(30,454)	\$(227,276)	\$(1,292,410)	\$(825,408)	\$(291,326)
Add: Stock-based compensation included in net loss, zero tax effect	5,780	3,706	13,999	46,518	146,385	13,253
Deduct: Stock-based compensation expense determined under the fair value method for all awards, zero tax effect	(26,936)	(54,047)	(132,737)	(271,580)	(503,420)	\$(114,602)
Pro-forma net loss	\$(83,930)	\$(80,795)	\$(346,014)	\$(1,517,472)	\$(1,182,443)	\$(392,675)
Basic and diluted net loss per share attributable to common stockholders:						
As reported	\$(0.94)	\$(0.49)	\$(3.83)	\$(22.39)	\$(14.97)	\$(6.25)
Pro forma	\$(1.26)	\$(1.30)	\$(5.83)	\$(26.29)	\$(21.44)	\$(8.42)

[Internal footnotes omitted]

**OPENWAVE'S VIOLATION OF GAAP RULES  
IN ITS FINANCIAL STATEMENTS  
FILED WITH THE SEC**

72. These financial statements and the statements about the Company's financial results were false and misleading, as such financial information was not prepared in conformity

with GAAP, nor was the financial information a fair presentation of the Company's operations due to the Company's improper accounting for and disclosure about its revenues, in violation of GAAP rules.

73. GAAP are those principles recognized by the accounting profession as the conventions, rules and procedures necessary to define accepted accounting practice at a particular time. Regulation S-X (17 C.F.R. § 210.4 01(a) (1)) states that financial statements filed with the SEC which are not prepared in compliance with GAAP are presumed to be misleading and inaccurate. Regulation S-X requires that interim financial statements must also comply with GAAP, with the exception that interim financial statements need not include disclosure which would be duplicative of disclosures accompanying annual financial statements. 17 C.F.R. § 210.10-01(a).

74. The fact that Openwave will restate its financial statements, and disclosed that these financial statements should not be relied upon is an admission that they were false and misleading when originally issued (APB No.20, ¶¶7-13; SFAS No. 154, ¶25).

75. Given these accounting irregularities, the Company announced financial results that were in violation of GAAP and the following principles:

- (a) The principle that "interim financial reporting should be based upon the same accounting principles and practices used to prepare annual financial statements" was violated (APB No. 28, ¶10);
- (b) The principle that "financial reporting should provide information that is useful to present to potential investors and creditors and other users in making rational investment, credit, and similar decisions" was violated (FASB Statement of Concepts No. 1, ¶34);

- (c) The principle that “financial reporting should provide information about the economic resources of an enterprise, the claims to those resources, and effects of transactions, events, and circumstances that change resources and claims to those resources” was violated (FASB Statement of Concepts No. 1, ¶40);
- (d) The principle that “financial reporting should provide information about an enterprise’s financial performance during a period” was violated (FASB Statement of Concepts No. 1, ¶42);
- (e) The principle that “financial reporting should provide information about how management of an enterprise has discharged its stewardship responsibility to owners (stockholders) for the use of enterprise resources entrusted to it” was violated (FASB Statement of Concepts No. 1, ¶50);
- (f) The principle that “financial reporting should be reliable in that it represents what it purports to represent” was violated (FASB Statement of Concepts No. 2, ¶¶ 58-59);
- (g) The principle that “completeness, meaning that nothing is left out of the information that may be necessary to insure that it validly represents underlying events and conditions” was violated (FASB Statement of Concepts No. 2, ¶79); and
- (h) The principle that “conservatism be used as a prudent reaction to uncertainty to try to ensure that uncertainties and risks inherent in business situations are adequately considered” was violated (FASB Statement of Concepts No. 2, ¶95).

76. The adverse information concealed by Defendants during the Class Period and detailed above was in violation of Item 303 of Regulation S-K under the federal securities law (17 C.F.R. §229.303).

**PLAINTIFF'S CLASS ACTION ALLEGATIONS**

77. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of a Class, consisting of all those who purchased the common stock of Openwave between September 30, 2002 and October 26, 2006, inclusive (the "Class Period") and who were damaged thereby. Excluded from the Class are Defendants, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

78. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, Openwave's common stock was actively traded on NASDAQ. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that there are hundreds or thousands of members in the proposed Class. Record owners and other members of the Class may be identified from records maintained by Openwave or its transfer agent and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions.

79. Plaintiff's claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of federal law that is complained of herein.

80. Plaintiff will fairly and adequately protect the interests of the members of the

Class and has retained counsel competent and experienced in class and securities litigation.

81. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

- (a) whether the federal securities laws were violated by Defendants' acts as alleged herein;
- (b) whether statements made by Defendants to the investing public during the Class Period misrepresented material facts about the business, operations and management of Openwave; and
- (c) to what extent the members of the Class have sustained damages and the proper measure of damages.

82. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

#### **UNDISCLOSED ADVERSE FACTS**

83. The market for Openwave's common stock was open, well-developed and efficient at all relevant times. As a result of these materially false and misleading statements and failures to disclose, Openwave's common stock traded at artificially inflated prices during the Class Period. Plaintiff and other members of the Class purchased or otherwise acquired Openwave's common stock relying upon the integrity of the market price of Openwave's



common stock and market information relating to Openwave, and have been damaged thereby.

84. During the Class Period, Defendants materially misled the investing public, thereby inflating the price of Openwave's common stock, by publicly issuing false and misleading statements and omitting to disclose material facts necessary to make Defendants' statements, as set forth herein, not false and misleading. Said statements and omissions were materially false and misleading in that they failed to disclose material adverse information and misrepresented the truth about the Company, its business and operations, as alleged herein.

85. At all relevant times, the material misrepresentations and omissions particularized in this Complaint directly or proximately caused or were a substantial contributing cause of the damages sustained by Plaintiff and other members of the Class. As described herein, during the Class Period, Defendants made or caused to be made a series of materially false or misleading statements about Openwave's business, prospects and operations. These material misstatements and omissions had the cause and effect of creating in the market an unrealistically positive assessment of Openwave and its business, prospects and operations, thus causing the Company's common stock to be overvalued and artificially inflated at all relevant times. Defendants' materially false and misleading statements during the Class Period resulted in Plaintiff and other members of the Class purchasing the Company's common stock at artificially inflated prices, thus causing the damages complained of herein.

### **LOSS CAUSATION**

86. Defendants' wrongful conduct, as alleged herein, directly and proximately caused the economic loss suffered by Plaintiff and the Class.

87. During the Class Period, Plaintiff and the Class purchased common stock of Openwave at artificially inflated prices and were damaged thereby. The price of Openwave's

common stock significantly declined when the misrepresentations made to the market, and/or the information alleged herein to have been concealed from the market, and/or the effects thereof, were revealed, causing investors' losses.

### **SCIENTER ALLEGATIONS**

88. As alleged herein, Defendants acted with scienter in that Defendants knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. As set forth elsewhere herein in detail, Defendants, by virtue of their receipt of information reflecting the true facts regarding Openwave their control over, and/or receipt and/or modification of Openwave's allegedly materially misleading misstatements and/or their associations with the Company which made them privy to confidential proprietary information concerning Openwave, participated in the fraudulent scheme alleged herein.

89. Additionally, during the class period, and with the Company's stock trading at artificially inflated prices, Openwave was able to generate significantly superior amounts of capital through its public offering, acquisition strategies, and subsequent financial dealings.

### **Applicability of Presumption of Reliance: Fraud On The Market Doctrine**

90. At all relevant times, the market for Openwave's common stock was an efficient market for the following reasons, among others:

- (a) Openwave's stock met the requirements for listing, and was listed and actively traded on the NASDAQ, a highly efficient and automated market;
- (b) As a regulated issuer, Openwave filed periodic public reports with the

SEC and NASDAQ;

- (c) Openwave regularly communicated with public investors via established market communication mechanisms, including through regular disseminations of press releases on the national circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services; and
- (d) Openwave was followed by several securities analysts employed by major brokerage firms who wrote reports which were distributed to the sales force and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace.

91. As a result of the foregoing, the market for Openwave's common stock promptly digested current information regarding Openwave from all publicly-available sources and reflected such information in Openwave's stock price. Under these circumstances, all purchasers of Openwave common stock during the Class Period suffered similar injury through their purchase of Openwave common stock at artificially inflated prices and a presumption of reliance applies.

#### **NO SAFE HARBOR**

92. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this complaint. Many of the specific statements pleaded herein were not identified as "forward-looking statements" when made. To the extent there were any forward-looking statements, there were no meaningful cautionary statements identifying important factors that could cause actual results to

differ materially from those in the purportedly forward-looking statements. Alternatively, to the extent that the statutory safe harbor does apply to any forward-looking statements pleaded herein, Defendants are liable for those false forward-looking statements because at the time each of those forward-looking statements was made, the particular speaker knew that the particular forward-looking statement was false, and/or the forward-looking statement was authorized and/or approved by an executive officer of Openwave who knew that those statements were false when made.

**FIRST CLAIM**  
**Violation of Section 10(b) of**  
**The Exchange Act and Rule 10b-5**  
**Promulgated Thereunder Against All Defendants**

93. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

94. During the Class Period, Defendants carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) deceive the investing public, including Plaintiff and other Class members, as alleged herein; and (ii) cause Plaintiff and other members of the Class to purchase Openwave common stock at artificially inflated prices. In furtherance of this unlawful scheme, plan and course of conduct, Defendants, and each of them, took the actions set forth herein.

95. Defendants (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's common stock in an effort to maintain artificially high market prices for Openwave's common stock in violation of Section 10(b) of the Exchange Act and Rule 10b-5. All Defendants are sued either as primary

participants in the wrongful and illegal conduct charged herein or as controlling persons as alleged below.

96. Defendants, individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business, operations and future prospects of Openwave as specified herein.

97. These Defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of Openwave's value and performance and continued substantial growth, which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about Openwave and its business operations and future prospects in light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of Openwave common stock during the Class Period.

98. Each of the Individual Defendants' primary liability, and controlling person liability, arises from the following facts: (i) the Individual Defendants were high-level executives and/or directors at the Company during the Class Period and members of the Company's management team or had control thereof; (ii) each of these Defendants, by virtue of his responsibilities and activities as a senior officer and/or director of the Company was privy to and participated in the creation, development and reporting of the Company's internal budgets, plans, projections and/or reports; (iii) each of these Defendants enjoyed significant personal contact and

familiarity with the other Defendants and was advised of and had access to other members of the Company's management team, internal reports and other data and information about the Company's finances, operations, and sales at all relevant times; and (iv) each of these Defendants was aware of the Company's dissemination of information to the investing public which they knew or recklessly disregarded was materially false and misleading.

99. The Defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such Defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing Openwave's operating condition and future business prospects from the investing public and supporting the artificially inflated price of its common stock. As demonstrated by Defendants' overstatements and misstatements of the Company's business, operations and earnings throughout the Class Period, Defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by deliberately refraining from taking those steps necessary to discover whether those statements were false or misleading.

100. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price of Openwave common stock was artificially inflated during the Class Period. In ignorance of the fact that market prices of Openwave's common stock were artificially inflated, and relying directly or indirectly on the false and misleading statements made by Defendants, or upon the integrity of the market in which the common stock trades, and/or in the absence of material adverse information that was known to or recklessly disregarded by Defendants, but not disclosed in public statements by

Defendants during the Class Period, Plaintiff and the other members of the Class acquired Openwave's common stock during the Class Period at artificially high prices and were damaged thereby.

101. At the time of said misrepresentations and omissions, Plaintiff and other members of the Class were ignorant of their falsity, and believed them to be true. Had Plaintiff and the other members of the Class and the marketplace known the truth regarding the problems that Openwave was experiencing, which were not disclosed by Defendants, Plaintiff and other members of the Class would not have purchased or otherwise acquired their Openwave common stock, or, if they had acquired such common stock during the Class Period, they would not have done so at the artificially inflated prices which they paid.

102. By virtue of the foregoing, Defendants have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

103. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and the other members of the Class suffered damages in connection with their respective purchases and sales of the Company's common stock during the Class Period.

**SECOND CLAIM**  
**Violation of Section 20(a) of**  
**The Exchange Act Against the Individual Defendants**

104. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

105. The Individual Defendants acted as controlling persons of Openwave within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions, and their ownership and contractual rights, participation in and/or awareness of the Company's operations and/or intimate knowledge of the false financial statements filed by the

Company with the SEC and disseminated to the investing public, the Individual Defendants had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which Plaintiff contends are false and misleading. The Individual Defendants were provided with or had unlimited access to copies of the Company's reports, press releases, public filings and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

106. In particular, each of these Defendants had direct and supervisory involvement in the day-to-day operations of the Company and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same.

107. As set forth above, Openwave and the Individual Defendants each violated Section 10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint. By virtue of their positions as controlling persons, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and other members of the Class suffered damages in connection with their purchases of the Company's common stock during the Class Period.

**WHEREFORE**, Plaintiff prays for relief and judgment, as follows:

- a. Determining that this action is a proper class action under Rule 23 of the Federal Rules of Civil Procedure;
- b. Awarding compensatory damages in favor of Plaintiff and the other Class members against all Defendants, jointly and severally, for all



damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

c. Awarding Plaintiff and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

d. Such other and further relief as the Court may deem just and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury.

Dated: March 5, 2007

Respectfully submitted,

**BRODSKY & SMITH, LLC**

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